

1614862 (Refugee) [2019] AATA 6849 (20 November 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1614862

COUNTRY OF REFERENCE: India

MEMBER: Hugh Sanderson

DATE: 20 November 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a protection visa.

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3. Statement made on 20 November 2019 at 11:29am

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5. CATCHWORDS

6. *REFUGEE – protection visa – India – family property dispute – applicant and her mother assaulted and harassed by relatives – pressured to give up ownership – lack of documentary evidence – significant delay in applying for protection – credibility issues – decision under review affirmed*

7.

8. LEGISLATION

9. *Migration Act 1958 (Cth), ss 5, 36, 65, 499*

10. *Migration Regulations 1994 (Cth), Schedule 2*

11.

12. Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

13. This is an application for review of a decision made by a delegate of the Minister for Immigration on 22 August 2016 to refuse to grant the applicant a protection visa under s.65 of the *Migration Act 1958* (the Act).
14. The applicant, who claims to be a citizen of India, applied for the visa on 27 April 2016. The delegate refused to grant the visa on the basis that the applicant was a person in respect of whom Australia has protection obligations.

Background

15. The applicant was born in India and is currently [age] years old. She first entered Australia [in] December 2008 holding a [Student] visa. She held this visa on the basis of being the dependent of her husband, [Mr A], who planned to study in Australia. When she arrived in Australia, her parents and [sisters] remained living in India.
16. The applicant returned to India [in] March 2010 after the death of her father. She returned to Australia [in] September 2010 on her Student visa. The applicant divorced her husband, [Mr A], [in] June 2012. She then married [Mr B] [in] August 2012 and he sponsored her for a Partner visa. The applicant was granted a [Partner] (Temporary) visa on 28 October 2013. When the Department of Immigration (the Department) was assessing the applicant's relationship for the grant of the [Partner] (Residence) visa, the delegate was not satisfied the applicant was in a continuing relationship with her sponsor and refused the application. The applicant applied for a review of that decision before the Tribunal. The applicant failed to appear before the Tribunal for a hearing and the Tribunal affirmed the decision to refuse the applicant the [Partner] (Residence) visa on 31 March 2016.
17. The applicant applied for the protection visa on 27 April 2016. In her application, she made the following claims:
 - The applicant returned to India in 2010 to attend her father's funeral;
 - For the last 10 years, there had been a dispute with her relatives about her parent's land which had been the land of their common ancestors;
 - As her father did not have a son, the applicant's relatives have tried to snatch the land by claiming that there was no future generation of her father;
 - There had been case hearings and expensive case courts, which had led to her father's bad health;
 - After her father's funeral, her relatives came to the home and asked her and her mother to vacate the properties and sign papers to say that they had nothing to do with their land and to hand the land back to their relatives;
 - When the applicant opposed this, they scolded her and asked her to leave the country saying if she did not the results would be bad;
 - Unlike her sisters, the applicant had always looked after her parents and they treated her like their son;

- Her relatives would come over to their home every day and ask her to sign the papers;
 - Despite asking a lawyer for help, everyone suggested they leave the property as it was not easy for females to go to court and handle cases;
 - One day, the relatives entered the house with some men and beat her and her mother mercilessly;
 - The applicant and her mother went to the local police station to register the complaint, but the police did not register the complaint as there was pressure from politicians not to do so; and
 - If she returns to India it is likely her relatives will beat her again or kill her so that there will be no one left to fight with them anymore.
18. The applicant claimed that it was not easy for her to relocate to any other part of the country as her husband, [Mr C], who is an Australian citizen is having treatment for acute grief, depression and anxiety following the breakdown of his earlier marriage. She claimed her sisters have their own families and she did not want to be any burden to them.
19. The delegate who considered the application was not satisfied that the applicant's fear of harm was for any of the reasons provided in s.5J(1)(a) of the Act as the harm it was claimed she feared did not have a nexus with membership of a particular social group.
20. When considering the complementary protection criterion the delegate noted that the authorities in India take reasonable measures to protect the lives and safety of citizens. In assessing the applicant's claims, the delegate was satisfied the applicant could obtain, from Indian authorities, protection such that there would be no real risk that she would suffer any harm. The delegate found that the applicant was not a person in respect of whom Australia has protection obligations as outlined in s.36(2C) of the Act and refused the application.

Information to the Tribunal

21. The applicant provided a further statement to the Tribunal where she made the following claims:
- After her father's death in August or September 2010 her cousin and his relatives asked her mother and her to sign legal papers to have the home of the applicant's father transferred to them and when they refused they assaulted her mother and the applicant;
 - Prior to and after lodging the protection visa application, the applicant's mother spoke to her almost daily saying "They asked me to sign the papers every day. It is like torture going through the same thing every day" and "There is no one here to help us";
 - In late 2016, the applicant's cousin and his relatives came to the village and took possession of the home and they now occupy the home;
 - In January 2017, the cousin lodged a false police complaint against the applicant and her mother claiming the mother was living in the home illegally and the police tried to get the mother to sign documents which she refused to do so;

- The applicant's mother told her that she could not return to India because she would not be safe there;
 - In January 2018 the cousin's son telephoned the applicant and threatened her saying that he "will have to do something about the old lady and deal with you when you come back here";
 - Due to pressure on her mother, her mother died in February 2018;
 - The cousin and his family continue to live in her parents' home; and
 - The applicant has no family in India apart from her sisters who live close by to her parents' home and she fears going there.
22. The applicant appeared before the Tribunal on 25 September 2019 to give evidence and present arguments. The Tribunal also received evidence from a friend of the applicant, Mr [D]. The hearing was conducted with the assistance of an interpreter in the Punjabi and English languages. The applicant was represented by her registered migration agent, who attended the hearing.
23. The applicant claimed she arrived in Australia in December 2008 as the partner of her then husband who held a Student visa. She said she returned to India in 2010 due to an emergency, which was why her husband did not accompany her. She said that her father died when she was in India. She said her cousin was harassing them and trapping them in legal proceedings. She claimed that she was assaulted by her cousin and his family due to the property dispute.
24. The applicant said that when she returned to Australia her relationship with her husband deteriorated because his family in India had been threatened by her cousin and his family. She said her husband told her that he could not continue to live with her as it would risk his life. She said things were pretty bad at that time due to the threats being made against her by her cousin. She said she did nothing about seeking a protection visa at the time because she was stressed because her cousin was harassing her and her mother in India. She said that her mother was attacked by her cousin and his family in 2010 and her mother [suffered injuries] and had to go to a private hospital. She said she had no evidence of this because her mother did not know she would need the documents.
25. The applicant said that her mother travelled to Australia [in] February 2016 and returned to India [in] May 2016. The Tribunal asked the applicant why, if her mother had been threatened and had been assaulted by her husband's cousin and his family that she did not apply for a protection visa as the applicant had. The applicant said that she did not know she could apply for one.
26. The applicant said that she did not apply for a protection visa at that time as she wanted to file a Partner visa application on the basis of her marriage to Mr [C]. She said she planned to return to India to file an offshore application but her mother explained to her all the harassment that she had suffered in India and the applicant would suffer if she returned.
27. The applicant said that her cousin and his family lived in Calcutta and they would travel by train a day and a half to Punjab where they would threaten and harass her mother about the property. She said that in January 2017 after lodging a false police complaint it was agreed that the cousin and his family could move into the property with the applicant's mother. She said that her mother had been continually harassed and as a result of this she died in February 2018. She said that she wanted a post-mortem conducted to establish the reason why her mother died but this was denied on the basis that she was an elderly woman and

there was no need for a post-mortem. The applicant claimed she believed her cousin had killed her mother.

28. The applicant said that she was currently living in the home of Mr [D] and his family. She said that her relationship with Mr [C] had ended and they were now divorced. She said Mr [D]'s father was a friend of her father.
29. The applicant provided details of her three sisters who continue to live in India. She said they all lived near the home in which there is a dispute. She said they were all married, apart from [one] sister, [Ms E], who is a widow. She said that they do not face the same problems that she would face in India because they have their own property and although they face threats from their cousin and his family, their cousin does not believe that they will take the property from him. The applicant said her sister, [Ms E], travelled to Australia on a [temporary] visa in 2016 or 2017 to visit her son who lives in Melbourne. She said that she did not apply for a protection visa at that time because she does not face the same threats that the applicant believes she faces. She said that she was also planning to get another visa to live in Australia.
30. The Tribunal referred to the court case that the applicant claimed had been taken in respect of the property. The applicant said that she did not have any documents about this court case. She said that she had no documents to be able to show that she has any interest in the disputed property. The Tribunal noted that in the application the applicant said that she would be providing the property dispute documents, but nothing had been provided. The applicant said she needed more time to provide documents. She said that when her mother was in Australia she needed evidence from her but her mother was prevented from providing this information. She claimed her mother was not an educated person and was not able to do this. She said that when the cousin and his family moved into the property, her mother was prevented from providing her with any documents.
31. The applicant said that there had been no further court proceedings since her father died in 2010. She said those court proceedings were commenced by her father and were dismissed after he died. She said that she had not commenced any proceedings about the property and none of her sisters had done anything about it. She said that she had no evidence that she had any interest in the disputed property.
32. The applicant claimed she and her mother had attempted to get protection from the Punjabi police but they had not assisted them because they were women. She claimed the Punjabi police were corrupt and her cousin and his family had a political influence over them.
33. The Tribunal put to the applicant that the only threat against the applicant was from her cousin and his family and that she would be easily able to relocate to some other location in India and nominated Delhi as a likely place. The applicant said there was no safe place in Delhi because there are a lot of murders there and political issues. She said that there were fewer employment opportunities in India than there were in Australia. She said that she would need a university degree to get any job in India.
34. Mr [D] gave evidence in support of the applicant. He said that he returned to India for his nephew's wedding and also attended the funeral of the applicant's mother. He said that he met the three sisters of the applicant after the funeral and spent about half an hour talking to them. He said the sisters, cousins and everyone from the village attended the funeral. He claimed the sisters told him that their mother's death was not that natural and that they would threaten the applicant if she returned to India.
35. The applicant was given further time to provide a copy of the claimed police report regarding the assault against her and her mother.

36. The applicant provided three documents (with translations) which were purported to be a statement made by [Mr F] dated 3 January 2017, the report of a 'mutual agreement between parties' dated 5 January 2017 and a report from a police officer dated [in] January 2017.
37. The statement from [Mr F] made the following claims:
- Their ancestral home built in 1965 was owned by his older paternal uncle, his father and his younger paternal uncle and his "troublemaker aunt" ([Ms G]) resides in the house;
 - They had come to celebrate his son's wedding which was to take place [in] February 2017;
 - [In] December 2016, some unknown men arrived in the car and took the "troublemaker aunt" and then brought her back after half an hour;
 - The aunt and her daughter in Australia (the applicant) are threatening that they will create trouble for us during the wedding and they will lodge a false FIR against us;
 - He appeals that the toughest action should be taken against the troublemaker for creating trouble, threats and unsolicited harassment as they do not want any trouble when their son is married; and
 - They are fearful [Ms G] will cause trouble and harass them during the marriage of his son.
 - After the marriage they will make a permanent written agreement on the home and its division and [Ms G] is in agreement with this.
38. A further statement was provided dated 5 January 2017 claiming the problems had been resolved and Mr [F] did not want to lodge a complaint against [Ms G], the applicant's mother. It was stated that after the marriage they will make a permanent written agreement on the home and its division and [Ms G] is in agreement with this.
39. The 'mutual agreement between parties' states that up until the marriage of [Mr F]'s son [in] February 2017 both parties will continue to stay in the family home together and [Mr F]'s family will return to Calcutta [in] March 2017. [In] March 2017, they will sit together and make an agreement about their ancestral home.
40. The report from the police states that [Mr F] had made accusations against his aunt, [Ms G], and both parties were summoned and counselled and an agreement was reached and no further action was being taken.

CRITERIA FOR A PROTECTION VISA

41. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, he or she is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
42. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee.

43. A person is a refugee if, in the case of a person who has a nationality, they are outside the country of their nationality and, owing to a well-founded fear of persecution, are unable or unwilling to avail themselves of the protection of that country: s.5H(1)(a). In the case of a person without a nationality, they are a refugee if they are outside the country of their former habitual residence and, owing to a well-founded fear of persecution, are unable or unwilling to return to that country: s.5H(1)(b).
44. Under s.5J(1), a person has a well-founded fear of persecution if they fear being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, there is a real chance they would be persecuted for one or more of those reasons, and the real chance of persecution relates to all areas of the relevant country. Additional requirements relating to a 'well-founded fear of persecution' and circumstances in which a person will be taken not to have such a fear are set out in ss.5J(2)-(6) and ss.5K-LA, which are extracted in the attachment to this decision.
45. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of the visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion'). The meaning of significant harm, and the circumstances in which a person will be taken not to face a real risk of significant harm, are set out in ss.36(2A) and (2B), which are extracted in the attachment to this decision.

Mandatory considerations

46. In accordance with Ministerial Direction No.84, made under s.499 of the Act, the Tribunal has taken account of policy guidelines prepared by the Department and relevant country information assessments prepared by the Department of Foreign Affairs and Trade (DFAT) expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

47. On the basis of the applicant's identity documents, including her passport and evidence provided at the hearing before the Tribunal, the Tribunal accepts that the applicant is a national of India. Therefore, for the purposes of s.36(2)(a) of the Act and the meaning of refugee in s.5H of the Act, the Tribunal accepts that India is the country of nationality. For the purposes of s.36(2)(aa) of the Act, the Tribunal accepts that India is the receiving country.
48. The basis of the applicant's claim is that she has a personal dispute with her cousin and his family about the property in which her parents lived in India. There is no claim that she fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or for her political opinion.
49. The applicant claimed that her parents and she had been in a dispute with her cousin and his family about the property her parents had been living. She claimed that for 10 years her father was fighting a case in court against their relatives who she claimed were trying to snatch the land from her family. Despite the fact that the applicant has been living in Australia since 2008, she claimed that she looked after her parents like a son and therefore her relatives see her as a threat to their ownership of the property and not her sisters who have always lived in India. She claimed that she had been talking to a lawyer to handle their case.

50. Despite the claim that there have been various court proceedings in relation to the alleged property dispute, the applicant does not provide any documentation to support her claims. The applicant claimed that all documents have been lost and that she did not realise she would need those documents to support her application. The Tribunal does not accept this.
51. If the applicant's father had been involved in litigation with his relatives over a 10-year period in relation to the property he was living in, the Tribunal does not accept that there would be no documentation to establish this fact. Further, the applicant would have been able to obtain documentation from those court proceedings from the appropriate court authorities who would hold records of those proceedings. That the applicant has not provided any documentation to substantiate her claim that there had been 10 years of court proceedings in relation to this property undermines her claims that there has ever been any dispute about any property.
52. The applicant claimed that she had also instructed a lawyer to handle their case. Again, there is no documentation to substantiate this claim. Even if the lawyer had declined to commence proceedings or the applicant had decided not to commence proceedings for any reason, the Tribunal does not accept that there would not be some documentation of advice given by the lawyer or evidence of her consulting that lawyer in relation to the proceedings. That no documentation has been provided undermines her claims that there has ever been any dispute about any property between herself and any other person in India.
53. The applicant has provided no documentation which would indicate that she or her parents have any right over any property in India. As the alleged dispute is in relation to who was the rightful owner of the property her parents were living in, it would be expected that the applicant and her family would have had access to all documentation to establish the ownership of that property. The applicant has not provided copies of any documents to the Department or to the Tribunal which would indicate she, or any member of her family, has any right of ownership over any property. This again undermines the credibility of the claims she has made that she is in a dispute with her relatives about the ownership of property.
54. When she lodged her application with the Department on 27 April 2016 she stated that she would be providing "property dispute documents". She has provided no documents to the Department or the Tribunal since then. Her mother was living in India and would have had the opportunity to obtain those documents from either the court or her lawyer. The Tribunal does not accept the claim that as she was not educated this would have stopped her from getting any relevant documents to substantiate the applicant's claims. The applicant claimed she employed a lawyer in India. Even if that lawyer did not assist her with her claim, the lawyer would have been able to access and provide documents to support the applicant's claims. The Tribunal does not accept that if there were documents to establish the claim that there was a property dispute or that the applicant had any claim over a property in India that she has not had the opportunity and resources to obtain those documents. As indicated above, as no documentation has been provided this undermines the claims made by the applicant.
55. The applicant claimed that when she was in India in 2010 when her father died that the relatives entered their house forcefully with some men and beat her and her mother mercilessly. She claims that she made a complaint to the police but the police did not register the complaint due to pressure from politicians. The Tribunal does not accept this. The Tribunal has referred to country information below¹ in respect of the process that would be adopted if a complaint was lodged with the police in Punjab and the effectiveness of a complaint being made. No information has been provided which would indicate the applicant's relatives have any political influence in Punjab.

56. The Tribunal is not satisfied that if the applicant and her mother had been beaten “mercilessly” and that the applicant had made a complaint to the police that there would not be some documentation from the police establishing this claim.
57. During the hearing, the applicant claimed that as a result of the assault on her and her mother in 2010 her mother [was injured] and had to go to a private hospital. This claim had not previously been made by the applicant. There is no documentation which would substantiate the claim that her mother suffered any injury in 2010 that required her to go to a private hospital. The Tribunal does not accept that if the applicant’s mother had been admitted to a private hospital for any reason that the applicant would not be able to obtain documentation to confirm any injury suffered by her mother at that time and a description of how the injury occurred. Regardless of her mother’s level of education, the Tribunal does not accept that over the period since the alleged assault and the time since the applicant made the current application that documentation could not have been provided from the hospital. That no documentation was provided as to any admission to hospital by the applicant’s mother further undermines the claims made by the applicant.
58. The only documentation provided in support of the application were documents provided after the hearing. When considering these documents, the Tribunal takes into account the advice from DFAT that the manufacture and use of fraudulent documents is prevalent in India.¹
59. The statement, purportedly from [Mr F], alleges that the applicant’s mother and the applicant are threatening that they will create trouble for him and his family during the wedding ceremony of his son. No explanation is given why Mr [F] would be alleging in 2017 that the applicant would be planning trouble for his son’s wedding when she had been residing primarily in Australia since 2008 and had only returned to India on one occasion in 2010. It appears inconsistent with the genuineness of this document that Mr [F] would be complaining to the Punjabi police about purported threats being made by the applicant when she resided in Australia.
60. The purported complaint states after they arrived at the home “on the night [in] December 2016 some unknown (unrecognised) for men arrived in a car – numberplate [specified] they came and took the troublemaker aunt away and brought her back after half an hour. One of the four men was saying that he is the PA to [Mr H], they should be investigated”.
61. Part of the applicant’s claim is that she cannot rely on making any complaint to the police or protection from the police because of political interference. No explanation is given why Mr [F] would make an allegation in his statement that the applicant’s mother was taken away by unknown men when the applicant is making accusations these are people acting on the instruction of Mr [F]. Further, it is claimed the people who allegedly took the applicant’s mother away said that he is the PA to [Mr H], a politician. It is not explained why Mr [F] would identify a politician as being involved in the applicant’s mother’s kidnapping if, as the applicant alleges, it is her cousin’s political influence which has allowed him to make threats against the applicant’s mother and the applicant with impunity. The applicant claimed that she and her mother had attempted to lodge a First Incident Report (FIR) with the police previously, however they refused to record this information. If it was the case that Mr [F] and his family had such influence with the police that he would be able to stop the applicant and her mother from lodging an FIR, then there is no explanation as to why Mr [F] would provide a statement claiming the applicant’s mother was intending to lodge a false FIR.
62. The Tribunal places no weight on the alleged statement from Mr [F] as providing support to the applicant’s claim. The Tribunal does not accept the statement has been made by Mr [F] or any member of his family.

¹ DFAT Country Information Report India dated 17 October 2018 at paragraph 5.28.

63. The mutual agreement between the parties also does not provide support for the claims made by the applicant. It does not support the claim that the applicant's mother was forced out of the home or that the applicant's mother was subject to any threats or coercion to resolve any purported issue as to the ownership of any property in India. If there was any further discussion between the parties [in] March 2017, as is stated in the purported agreement, there is no information as to what happened at that time. It does not indicate that the applicant was required for any reason to be involved in any discussions about the property.
64. The purported statement from the Senior Police Captain does not support the applicant's case. As it states that the complaint was investigated and both parties were summoned and counselled, it indicates the police were acting independently of both the applicant's mother and Mr [F] in relation to any alleged complaint made. There is no indication in the statement that the applicant's mother has been subject to any threat or coercion. Despite the claim made in the alleged statement from Mr [F], there is no reference to the applicant's mother being taken by four men and held for about half an hour. It is also puzzling why the applicant is mentioned in the complaint when she had not been in India for almost seven years at that time.
65. The Tribunal does not accept these documents, even if genuine, provide any support to the claims being made by the applicant that she will face harm from her relatives if she returns to India due to an alleged dispute she has with them about a property in India.
66. The applicant stated that her father was involved in court proceedings in respect of the property for 10 years. As indicated above, there has been no documentation provided in support of this claim. Country information indicates that 'Punjab has an independent judiciary, the decisions of which are generally accepted as being fair and unbiased... The court system could be relied upon to settle fairly issues around contract disputes and property rights enforcement, although this needs to be placed in the context of generally poor contract enforcement standards across India'². Significant delays are recognised in the Indian court system³, however, if there were a genuine dispute between the applicant's parents and her cousin's family about the property, it would appear the Indian courts would appropriately determine that issue.
67. Though the Tribunal recognises difficulties within the Punjabi police force, the Tribunal is not satisfied that if the applicant were subject to any harassment or assault that she would not be able to obtain effective protection from the relevant police organisation. In her application, the applicant claimed she could not obtain protection from the police because "some politicians and high-level officers have advised and forced them not to help us in any manner". There is no explanation as to why any politicians or high-level officers would have interfered in the claimed dispute. There is no information which would indicate the applicant's relatives are involved in any political organisation or that they have any political or other influence at all. As the applicant said her cousin lives in Calcutta it is not explained why they would have influence over the police in Punjab. As indicated above, there is no explanation why the purported statement from Mr [F] alleges a politician had ordered the applicant's mother be kidnapped and taken away for half an hour.
68. The Tribunal does not accept that if the applicant were subject to any assault or threat in India that she would not be able to make a complaint to the Punjabi police. The Tribunal finds that the applicant would receive effective protection from the police in respect of any alleged threat made against her.

² DFAT Thematic Report Indian State of Punjab dated 7 December 2016, paragraphs 5.4 and 5.5.

³ DFAT Country Information Report India dated 17 October 2018, paragraphs 5.6 to 5.9.

69. There has been significant delay by the applicant in making any application for a protection visa. She claimed the basis of her fear of returning to India is that after her father died in 2010 she was subject to threats and abuse from other relatives seeking to have her parents property transferred to them.
70. The applicant had the temporary right to reside in Australia in 2010 as she was a member of the family unit of her husband who held a Student visa. The applicant claimed that her relationship with her husband ended soon after she returned to Australia in 2010 as she claimed his family in India had been threatened by her cousins. Despite her relationship with her husband ending at that time which meant that she did not meet the criteria for her visa, she did not apply for a protection visa at that time, claiming that she was stressed.
71. The Tribunal does not accept that if the applicant had been subject to any threats in 2010 or that her relationship with her then husband ended in 2010 due to threats being made by her cousin against his family that she would not have taken steps to obtain a protection visa. That she did not do anything at this time indicates that the claims that she has made in respect of this application are not genuine.
72. The applicant applied for and was granted a [Partner] (Temporary) visa on the basis of her relationship with [Mr B]. The Department refused to grant her a [Partner] (Residence) visa on 20 February 2015 on the basis that they were not satisfied that she was in a genuine and continuing relationship with her sponsor. Although the applicant applied for a review of that decision, the Department's decision was affirmed by the Tribunal. The applicant's evidence is that she married Mr [C] [in] March 2016. As she would have been required to divorce Mr [B] and to marry Mr [C] she must have been living separately and apart from Mr [B] for at least 12 months, this would mean that she would have ended her relationship with Mr [B] no later than January 2015.
73. If the applicant had ended her relationship with Mr [B] there is no reason why, if the claims being made by the applicant are genuine, she would not have made an application for a protection visa at that time. There is no information before the Tribunal that the applicant met any alternative criteria for the grant of the Partner visa if she were no longer in a genuine relationship with Mr [B]. The fact that she did not bring an application at the time her relationship with Mr [B] ended again indicates the claims being made by the applicant are not genuine.
74. The protection visa application was only made after a decision was made by the Tribunal to affirm the Department's decision to refuse the applicant the [Partner] (Residence) visa. The applicant waited until after the Tribunal affirmed the decision to refuse the [Partner] (Residence) visa when she acknowledges that she was not in a genuine and continuing relationship with her sponsor since January 2015 at the latest.
75. The applicant's claims are that her mother has been the subject of threats and abuse by her cousin and his family since at least 2010 after the death of the applicant's father. The applicant said that her mother travelled to Australia on a [temporary] visa from [February] 2016 before returning to India [in] May 2016. The Tribunal does not accept that if the applicant's mother had been subject to threats and abuse as the applicant claims and which is the basis of the applicant's application for a protection visa, that the applicant's mother would not have applied for a protection visa when she was in Australia.
76. The applicant claimed that her mother did not do this because she did not know she could apply for a protection visa. The Tribunal does not accept this. The applicant applied for her protection visa on 27 April 2016. It was at this time that her mother was in Australia. If the applicant genuinely believed she had grounds on which she could successfully apply for a protection visa and the claims that she was making was that her mother had suffered to a

greater extent due to the alleged threats and assaults from the applicant's cousin and his family, the Tribunal does not accept the applicant's mother would not have also applied for a protection visa. That her mother did not bring an application for a protection visa indicates that she did not face any threats or fear of harm from the applicant's cousin and his family or from any other person on returning to India. This indicates the claims made by the applicant are not plausible.

77. The Tribunal has considered all the claims and circumstances of the applicant both individually and cumulatively. The Tribunal does not accept that the property in which the applicant's parents lived is subject to a dispute with her cousin and his family. The Tribunal does not accept that the applicant, her mother or any other member of her family have been subject to any threats, abuse or assaults from her cousin or any member of his family or any person at his direction for any reason. The Tribunal does not accept the applicant's claims in their entirety. The Tribunal does not accept that the applicant has made complaints to the Punjabi police which have not been acted on and the Tribunal finds that if the applicant did have any concerns about her safety that she could lodge a complaint with the Punjabi police and that she would receive protection such that there would not be a risk that she would suffer significant harm.
78. As stated in paragraph 36, there is no claim that she fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or for her political opinion. Accordingly, and for the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(a).
79. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). For the reasons set out above, the Tribunal does not accept that as a necessary and foreseeable consequence of the applicant being removed from Australia to India there is a risk that the applicant will suffer significant harm. Accordingly, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
80. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

81. The Tribunal affirms the decision not to grant the applicant a protection visa.

Hugh Sanderson
Member

ATTACHMENT - Extract from *Migration Act 1958*

5 (1) Interpretation

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in them practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of serious harm for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

- (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a well-founded fear of persecution for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the first person), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or
 - (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

..

36 Protection visas – criteria provided for by this Act

...

(2A) A non-citizen will suffer **significant harm** if:

- (a) the non-citizen will be arbitrarily deprived of his or her life; or
- (b) the death penalty will be carried out on the non-citizen; or
- (c) the non-citizen will be subjected to torture; or
- (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
- (e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
- (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
- (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...